

**WAH SHEN DEVELOPMENT SDN BHD
v. SUCCESS PORTFOLIO SDN BHD**

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL SUIT NO: KCH-23NCVC 2-1-2015]
6 JANUARY 2016

CIVIL PROCEDURE: *Injunction – Application for – To cease operation of pig farm on adjoining land – Nuisance due to smell emanating from pig farm – Allegation that smell adversely affected sale of property by plaintiff – Whether plaintiff aware of pig farm business before buying over and developing adjoining land – Whether injunction ought to be granted*

The plaintiff and the defendant were owners of parcels of land located next to each other. The plaintiff was a property developer whilst the defendant was in the business of pig-rearing. The plaintiff's land was developed in to a mixed development of residential houses and shop houses. Whilst the development was going on, the defendant's pig farm was still on-going although there was an initiative by the State Government to re-locate all pig farms. The plaintiff contended that the smell from the pig farm was a nuisance and it had adversely affected the sales of the residential houses and the shop houses. The plaintiff contended that the defendant had breached condition 8 of its license given by the State Veterinary Authority Sarawak to operate the pig farm, in which suitable trees ought to be planted around the farm to control malodor and to act as buffer zone. The plaintiffs, therefore prayed for an injunction to restrain the defendant from continuing with their pig rearing activities on the said land. In defence, the defendant, *inter alia*, contended that they have been operating the pig farm business before the plaintiff bought over the adjoining land which was originally categorised as agricultural land as well before the change in condition to the present usage.

Held (dismissing claim with costs):

- (1) Although there were trees planted on the farm, the trees which were meant to act as a buffer zone were not there. Despite the breach of condition 8, the relevant State Authority had continued the defendant's licence to operate the pig farm. Despite the existence of the pig farm, the authorities concerned deemed it fit to vary the title condition of the plaintiff's land and allow the mixed development to be done there. Two wrongs do not make a right. (paras 14 & 17)
- (2) There is a principle in tort commonly known as the 'egg shell skull' principle which meant that a defendant must take the plaintiff as he is. It works the reverse here. The plaintiff had to take the defendant as it was because it was there first, legitimately operating their pig farm before the plaintiff decided to come in, bought what was agricultural

- A land and vary the title condition to build the houses and the shop houses without any concrete assurance whatsoever that the pig farm next door would be relocated. Therefore, it was not right for the injunction to be granted. The plaintiff brought the loss upon themselves. The defendant's adjoining pig farm would logically deter would be purchasers from
B buying their homes or set up their business so very close to it. (para 17)

Case(s) referred to:

Dr Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd [2013] 6 CLJ 597 HC (refd)

Legislation referred to:

Specific Relief Act 1950, s. 54(i)

- C **Other source(s) referred to:**

Clark & Lindsell on Torts, 18th edn, p 979

Winfield & Jolowicz, Tort, 17th edn, p 646

For the plaintiff - Lim Heng Choo (Steven Sia with him); M/s Lim & Lim Advocs

For the defendant - Jonathan Chong; M/s TC Chong & Co

- D *Reported by Sandra Gabriel*

JUDGMENT

- E **Rhodzariah Bujang J:**

[1] The plaintiff and defendant are neighbours, being owners of parcels of land next to each other. The plaintiff's two parcels of land registered under its name are described as Lot 274 and Lot 407 and that of the defendants, Lot 1991. In addition, the plaintiff have been granted a Power of Attorney
F over three parcels of land described as Leases of Crown Land No. 11148, 11149 and 11150 and these three parcels of land adjoin that of Lot 274 and Lot 407. However for the sake of simplicity and since it will become clear later that this will not compromise my resolution of the dispute between them, I would, unless specified otherwise simply refer to all five parcels of
G land as that of the plaintiff's. All the aforesaid land are in Sentah-Segu Land District situated in an area which is along the Kuching-Samarahan Expressway.

[2] The plaintiff was at the time of the filing of this action and its trial a property developer whilst the defendant was in the business of pig-rearing.
H The plaintiff's five parcels of land have been developed by them into what is popularly known as a mixed development – residential houses as well as shophouses have been built on the said lands with the said development been completed. Whilst the development was going on and at all material time, the defendant's pig farm was still an on-going business concern next door. I said "material time" because it was an undisputed fact at the trial that there
I is a State Government initiative to locate or re-locate all pig farms in Kuching and Samarahan areas to a designated area called Pasir Puteh Pig

Farming Area which is near another rural town in Sarawaks First Division, ie, Simunjan. The announcement was reported in an issue of a local daily, Borneo Post on 25 March 2015 which is at p. 222 of exh. P3 ie, the plaintiff's bundle of documents tendered at the trial. Though the content of the said bundle except for item 7 and 8 which are disputed, have been agreed as to authenticity only, nevertheless an officer of Natural Resources and Environmental Board ("NREB"), Mr Felix Joe Anak Daud (PW3) when shown the said report said, though not directly, that there was such a move but on the actual progress of the said initiative, he was not sure. The defendant sole witness, its Managing Director and a veterinarian, Dr Ng Siew Thiam was also shown the same newspaper report in Q & A 49 of his witness statement and affirmed the content of the same.

[3] The relocation of all pig farms have a certain bearing to this case because the plaintiff was suing the defendant for nuisance – all on account of the smell from the pig farm which it alleged has compromised or adversely affected the sales of particularly the residential houses as well as the shophouses on their said land causing them RM10,989,111.80 in loss. They have therefore prayed for an injunction to restrain the defendant from continuing with their pig rearing activities on the said farm, special damages in the sums specified above, general damages and cost.

[4] The defendant, in its statement of defence, *inter alia* pleaded that the smell from their farm is minimal and not unreasonable and denied giving the plaintiff an assurance as alleged in the plaintiff's statement of claim of relocating their pig farm which they pleaded is properly licensed by the Government including Agriculture Department. Further, they have been operating the pig farm business well before the plaintiff bought over the adjoining land which land were originally categorised as agricultural land as well before the change in condition to the present usage and the plaintiff was well aware of their pig farm operation when they did so, ie, before buying over the said land.

Land Use

[5] The plaintiff has exhibited all the documents of title for the five parcels of land from pp. 1 to 27 of exh. P3. These documents very clearly show under 'Restrictions and Special Condition' that they were "to be used only for agricultural purposes", although the plaintiff had subsequently obtained the requisite approval from the relevant authorities ie, Lands and Surveys Department and State Planning Authorities to vary the said title conditions which enabled them to proceed with the mixed development project on the said five parcels of land. Indeed, as testified by Dr Ng Siew Thiam in Q&A 12 of his witness statement (marked WSD1 at the trial) and unchallenged in cross-examination, the land adjoining his before being bought over by the plaintiff was used as a chicken farm. In fact said Dr Ng Siew Thiam, before the defendant bought the lands in 1994 it was owned by

- A Hui Lian Breeding Farm who was also the owner of the plaintiff's land Lot 274 and 407, he said in Q&A 6 of his witness statement. That previous owner operated a chicken farm on the plaintiff's Lot 274 and 407 and reared pigs on his, which operation the defendant continued when it bought over the land. Again the documents of title for Lot 274 and 407 under the column
- B "Transfer, Power of Attorney, Sublease, Charge Caveat, Etc" confirm that their previous owners was Hui Lian Breeding Farm Sdn Bhd, thus, rendering it safe for me to accept the truth of Dr Ng Siew Thiams evidence that the chicken and pig farms were co-existing side by side prior to the plaintiff's acquisition of the former. This finding must necessarily have a bearing in the final outcome of this case for me as the trial judge. However, before
- C explaining myself further, I would have to first mention that I went to visit the subject lands on application of Mr Lim Heng Choo for the plaintiff although when we arrived there, we did not enter the pig farm – only viewing it from the safe comfort of the plaintiffs adjoining land.

D **Site Observation**

- [6] The pig farm is actually surrounded on its one side and back by the development on the plaintiffs land with the remaining front of the land and another side facing the road. Sharing the immediate border with the pig farm are two rows of shop houses and behind them are the residential units or what
- E the plaintiff has labelled as "town houses". The pig farm ends at about where the first row of the residential units begins. Along that common border with the pig farm boards have been put up and I must also mention that the development on the plaintiffs land is on an elevated ground ie, that shop houses and the residential units stand on a higher ground than the pig farm
- F but we did not during the site visit go to the extent of measuring the difference in height. The plaintiff's land in turn is basically surrounded by secondary jungle except for the road frontage but across both the parties' land, though some distance away is a hill which has been partly quarried. I noted there is also a large pond on the pig farm which according to Dr Ng Siew Thiam is the oxidation pond where all the wastes from the pig farm are
- G channelled to.

- [7] When we arrived at the site it was about 3pm. The air was not pristine and though no noticeable wind was felt, the smell especially at the vicinity of the shophouses was strong. That would be unavoidable, of course and the
- H source of that stench could not be from any other place but the pig farm.

Smell A Nuisance

- [8] It is undeniable that smell can constitute a nuisance in law. Both Mr Lim Heng Choo and Mr Jonathan Chong for the defendant have cited to me excerpts from authoritative textbooks on tort to back up their cases where
- I 'smell' is mentioned as a form of nuisance. Starting with *Clark & Lindsell on Torts* (18th edn) at p. 979, this is what the learned authors have said in a

passage quoted by Lee Swee Seng JC (as His Lordship then was) in *Dr Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd* [2013] 6 CLJ 597 at p. 607; [2014] 9 MLJ 539 at p. 550: A

[24] A passage in *Clark & Lindsell on Torts* (18th Edition), London, Sweet & Maxwell, 2000 at page 979 is instructive and illuminating. It reads as follows: B

It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as voice, **smells** or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organized society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours ... No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society. (emphasis added). C D

[9] The learned authors, Winfield & Jolowicz in their book on *Tort* (17th edn) at p. 646 said these:

Generally, the essence of a nuisance is a state of affairs that is either continuous or recurrent, a condition or activity which unduly interferes with the use or enjoyment of land. It is not necessary that there be any physical emanation from the defendant's premises. **Noises and smells can be nuisance**, but so, it seems can be otherwise offensive businesses. (emphasis added) E

[10] However, as highlighted by Mr Jonathan Chong, the said authors caveated their statement above by saying these at p. 647: F

Not every slight annoyance is actionable. Stench, smoke, the escape of effluent and a multitude of different things may amount to a nuisance in fact but whether they constitute *an actionable nuisance* will depend on a variety of considerations, especially the character of the defendant's conduct and a balancing of conflicting interests. *In fact the whole of the law of private nuisance represents an attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit and that of his neighbor in the quiet enjoyment of his land.* Everyone must endure some degree of noise, smell, etc., from his neighbor, otherwise modern life would be impossible and such a privilege of interfering with the comfort of a neighbor is reciprocal ... *In fact, the law repeatedly recognizes that a person may use his own land so as to injure another without committing a nuisance. It is only if such use is unreasonable that it becomes unlawful.* (emphasis added) G H

[11] Before applying the law to the facts of this case, let me just state the pertinent facts in relation the defendants pig farm. I

A A Licensed Operation

[12] The defendant has exhibited a licence given to Dr Ng Siew Thiam by the State Veterinary Authority Sarawak to operate the pig farm as exh. D5 (A) to (F). It is a yearly one and exh. D5(A) is for the period starting from 12 December 2010 to 11 February 2011 and exh. D5 (F) was for 11 February 2015 until 11 February 2016. There are conditions attached to the licences – the same ones for every year but the pertinent ones for my consideration are conditions 8 to 10 which state as follows:

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- C**
- D**
8. Suitable trees or plants should be planed around the farm to control malodour and to act as buffer zone. Hoarding should be erected at the farm boundary.
 9. The licence is revocable under Section 44 – 6(b) of the Veterinary Public Health Ordinance, 1999, should the owner breach the conditions or caused pollution to any watercourse.
 10. This farm is to be moved to the Pig Farming Area (PFA) once it is established.

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[13] Though in all the licences the livestock farming was or is to be carried out at a different lot number than Lot 1991, ie, Lot 932, it was not an issue at the trial that the pig farm at Lot 1991 was an unlicensed one. The plaintiff in fact exhibited the same licence for 2015 to 2016 in their own exh. P2 and the contention raised in their case is that the defendant has breached condition 8 as reproduced above. For the record Lot 932 is also at Sentah-Segu Land District and in the examination in chief of Dr Ng Siew Thiam (at p. 57 of the notes of proceedings) he confirmed that the said exh. D5 (A-F) shown to him were the licences issued to his farm. This evidence of his was not contradicted in cross-examination making it safe for me to find that the pig farm was indeed a licensed operation. The breach of condition, however is another matter, altogether.

Condition 8

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[14] I have reproduced this earlier and the plaintiff has called as their first witness, Mr Granda ak Aing, a co-coordinator for Saytech General Inspection Services Sdn Bhd who prepared an Environmental Management Plan for the plaintiff in collaboration with Envirotech Environmental Consultancy Sdn Bhd for submission to NREB. Such a plan was in fact not a requirement under “NREB Law” according to Mr Felix Joe ak Daud (PW3) an Environmental officer with NREB because the plaintiff’s development project was less than ten hectares. Mr Granda in Q&A 12 of his witness statement (marked WSPW1) said that condition 8 has been breached in that there were no trees and plants planted to act as a buffer zone, the absence of which I have noted when during the site visit. To be fair to the defendant, there were indeed trees planted on the farm but ones which

were meant to act as a buffer zone were not there but the absence of which cannot be strictly held against them because prior to the plaintiff's development, as stated earlier, the chicken farm was on the plaintiff's land.

[15] In this regard, I also noted and this I say without any intention to be demeaning to the plaintiff's probable good intention to have the report done without the law requiring them to, that the report was actually prepared when the development was 60% completed. This can be seen from the photographs on the cover of the report at p. 39 of exh. P3 and specifically stated in the report at p. 45 of exh. P3. The report was, I further noted, prepared in December 2014 and this action was filed shortly thereafter in January 2015. The report specifically addresses the bad odour from the defendant's pig farm (at p. 114 and p. 116 to 117, para. 4.2.2 of exh. P3) and even have a specific para. 4.2.3 at p. 117 on the relocation of the pig farm to Pasir Puteh. It also exhibited a letter of complaint made by sixty purchasers of the properties on the plaintiff's land to the NREB about 'the severe contamination of pig farm on the defendant's land. The police report made by a nearby resident (p. 183 of exh. P3) who complained about pig faeces being thrown onto his land as well as a letter of complaint by one Junaidah binti Ibrahim, the purchaser of one of the units in the mixed development to the Serian Municipal Council regarding the adverse effects from the location of the pig farm to the property she bought were also included in the report. I noted that in the opening paragraph of that first mentioned letter of complaint it is stated that "However we discovered later there is a pig farming adjoins to this Housing estate....." (*sic*) None of the purchasers were called as a witness by the plaintiff but given that the pig farm was there before the development stated, I find it quite puzzling that the purchasers appeared not to be aware of its existence by the use of word 'discovered' unless all sixty of them bought the properties without even going to the site to view their intended purchases.

[16] In the face of all these evidence, I cannot rule out the probability that this report was prepared to bolster the plaintiff's case herein. This I say also because the plaintiff's own Business Manager, Ling Ping Hiong admitted in cross-examination that the plaintiff never served the defendant any written complaint about the alleged nuisance prior to the filing of this action although she did say that verbal ones were made which prompted Mr Jonathan Chong to put to her that the reason for this action was to force the defendant to sell the land to the plaintiff. She of course disagreed to the suggestion. Saying all these does not mean, for an instance, that I am condoning the breach of Condition 8 by the defendant or that I disagree of the unsuitability of having a pig farm right next door to a ready mixed development which incorporated residential homes. Whether it is pig or poultry or whether the purchasers are

A Muslim or non-Muslims, that make scant difference to the fact that these two do not and should not co-exist. The reason(s) is so obvious I need not have to spell it out. However, this does not mean that I have the right to grant the injunction prayed for by the plaintiff. My reason for saying so is this.

B [17] It is clear from the undisputed fact of the prior existence of the pig farm on the defendant's land before development of the plaintiff's land and the original title conditions of the plaintiff's land ie, agricultural that the plaintiff brought the nuisance upon themselves. There is a principle in tort commonly known as the egg shell skull principle which simply said means that a defendant must take the plaintiff as he is. It works the reverse here –
C the plaintiff have to take the defendant as it is because it was there first – legitimately operating their pig farm before the plaintiff decided to come in, bought what is agricultural land and vary the title condition to build the houses and the shophouses without any concrete assurance whatsoever that the pig farm next door would be relocated. Further, despite the breach of
D Condition 8 the relevant State authority have continued with renewing Dr. Ng Siew Thiam's licence to operate the pig farm and I might as well also say, despite the existence of the pig farm, the authorities concerned, though a different one also deemed it fit to vary the title condition of the plaintiffs land and allow the mixed development to be done there. Two wrongs, as the
E saying goes, do not make a right, and definitely it is not right for the injunction as prayed to be granted on account of my earlier consideration that the defendant's pig farm was there first.

[18] Further, Mr Jonathan Chong has referred me to s. 54(i) of the Specific Relief Act 1950 which provides that an injunction cannot be granted if an
F equally efficacious relief can be obtained by any other usual mode of proceeding. The breach of Condition 8 can and should be a matter for the relevant authority to consider before the upcoming renewal of the licence for it is within their authority to insist on its compliance before the same is done. In this regard, I refer to Dr Ng Siew Thiam's own admission given in
G re-examination that the defendant's pig farm is no longer a good farming land because encroachment of human activity will endanger the health of the pigs. With the official news on the centralisation of pig farms in Pasir Puteh, the relocation of the defendant's pig farm appears to me to be a matter of course. At the beginning of the trial, the defendant proposed to relocate within three years but the proposal was regrettably not accepted by the plaintiff. In the
H interest of both pigs and humans, inspite of this decision, I still harbour hope that parties would somehow agree to a time limit for that eventuality.

Loss And Damages

I [19] Nevertheless, based on the same earlier foregoing reasons, I am also constrained to hold that the plaintiff brought the loss upon themselves for Muslims or non-Muslims, sensitive noses or not, the defendant's adjoining

pig farm would logically deter would be purchasers from buying their homes or set up their business so very close to it. In saying this, I also noted that despite PW2's evidence at Q&A 11 of her witness statement that only 64% of the 352 units were sold, but what was advertised by a local Chinese daily, which hardcopy was tendered as defendant's exh. D2, was 80% of units have been sold ("SOLD 80%", it boldly claimed). Further, despite the written approval granted by the Ministry of Urban Wellbeing, Housing and Local Government (at p. 28 of exh. P3) dated 8 September 2014 for 92 of the residential units to be sold under the Ministry's Myhome 2 scheme, PW2 admitted during the trial that an agreement required to be signed between them and the Ministry after all the conditions specified in para. 2 of the letter have been complied with, have not been signed. Thus, at the time of completion of the trial, the plaintiff clearly cannot claim any loss related to any failure to sell that 92 residential units under the Myhome 2 Scheme which they have particularised at para. 15 of their statement of claim as RM5,934,000.

[20] To conclude, based on the foregoing reasons the plaintiff's claim is dismissed and I do so with cost of RM40,000 since it was not agreed.

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